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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ALFREDO D. TABRILLA, Defendant and Appellant.	A107596 (Solano County Super. Ct. No. FCR-47972)

I. INTRODUCTION

After pleading no contest to two counts of a four count indictment, appellant, a legal immigrant to the United States, was granted three years probation. Thereafter, he was charged with, and admitted, three separate violations of probation. After the third admitted violation, the court sentenced appellant to two years, eight months in state prison. Almost two years later, and after learning that he might be deported from the United States and also denied reentry as a result of his conviction on one of the counts to which he had pled no contest, appellant filed a motion to withdraw his 1999 plea. The basis of his motion was that the trial court failed to properly advise him of the immigration consequences of his plea pursuant to Penal Code section 1016.5 (section 1016.5). The trial court denied the motion, and appellant filed a timely notice of appeal. We affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

On October 16, 1998, a California Highway Patrol (CHP) officer stopped a stolen car that was being driven erratically in the vicinity of Fairfield, Solano County. Appellant was one of the passengers in the car; he was arrested and taken to a CHP office for questioning. A search of his person revealed a bag containing methamphetamine and "pay/owe" sheets. In the trunk of the car, the CHP officers found chemicals and equipment used to manufacture methamphetamine. Appellant admitted using the drug, but initially denied knowing the car in which he was a passenger was stolen or knowing about the methamphetamine manufacturing equipment. However, he later admitted participating in the process of making the drug.

In an amended information filed February 18, 1999, the Solano County District Attorney charged appellant with: conspiracy to manufacture methamphetamine (count 1; Pen. Code § 182, subd. (a)); manufacturing methamphetamine (count 2; Health & Saf. Code, § 11379.6, subd. (a)); vehicle theft (count 4;[1] Veh. Code, § 10851, subd. (a)); and aiding and abetting the possession of ephedrine with the intent to manufacture methamphetamine (count 5; Health & Saf. Code, § 11383, subd. (c)(1)).

On the same day, February 18, 1999, and pursuant to a plea agreement, appellant pled no contest to counts 4 and 5; counts 1 and 2 were dismissed with waivers pursuant to *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*). On March 18, 1999, the trial court suspended imposition of sentence on appellant and placed him on three years probation, on the condition, among other things, that he serve 270 days in county jail.

Appellant's probation was revoked on September 28, 1999, for his admitted failure to maintain contact with the probation department. The court reinstated probation, although extending it for three years from the date appellant admitted the violation, conditioned on him spending another 60 days in county jail.

In January 2002, the district attorney again moved to revoke probation; appellant admitted violating probation by possessing "a pipe used to smoke illegal substances." On

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[1] The third count of the amended information named only a co-defendant.

April 30, 2002, the court reinstated probation, although extending it for two years from the date of appellant's admission, conditioned on his spending another 90 days in county jail.

On October 1, 2002, appellant admitted a third violation of probation when he signed a statement on a court form that he had been terminated by the Salvation Army program "for testing positive for methamphetamine." The trial court assigned appellant to be evaluated for assignment to the California Rehabilitation Center pursuant to Welfare and Institutions Code section 3051, but then denied a petition to so commit him, reinstated the criminal proceedings, revoked probation, and sentenced appellant to serve two years and eight months in state prison.

In April 2003, when appellant was still in state prison, he was visited by an agent from the federal Immigration and Naturalization Service (INS), who advised him that he would be "taken into custody and placed in removal proceedings after [he] completed [his] state prison sentence." An INS form to this effect was served on him at the same time. In February 2004, appellant was taken into INS custody, moved to a federal facility in Arizona, and served with a notice to appear in immigration court. In the same month, his family began searching for an immigration attorney for appellant. Such an attorney, William Vela, was retained in March 2004.

Appellant was arraigned in immigration court in April 2004; prior thereto, Vela advised him that his conviction for violating Vehicle Code section 10851 (count 4 noted above) was "an aggravated felony" which could well result in "mandatory removal or deportation, but . . . also results in permanent exclusion, or inadmissibility, from the United States."

On May 10, 2004, appellant filed a motion to withdraw his no contest plea of almost five years earlier on the basis that the trial court had not adequately advised him of the immigration consequences of his plea as required by section 1016.5. The Solano County District Attorney's office opposed the motion, which the trial court denied on July 7, 2004. Appellant filed a timely notice of appeal.

III. DISCUSSION

Appellant concedes that our standard of review of a trial court's denial of a motion to withdraw a plea of guilty or no contest is abuse of discretion. This is clearly correct. (See *People v. Superior Court (Zamudio)* 23 Cal.4th 183, 192 (*Zamudio*).)

Section 1016.5 provides in pertinent part: "(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: [¶] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. [¶] (b) Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section. If, after January 1, 1978, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement. . . . [¶] (d) The Legislature finds and declares that in many instances involving an individual who is not a citizen of the United States charged with an offense punishable as a crime under state law, a plea of guilty or nolo contendere is entered without the defendant knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. Therefore, it is the intent of the Legislature in enacting this section to promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea or plea of nolo contendere be preceded by an appropriate warning of the special consequences for such a

defendant which may result from the plea. It is also the intent of the Legislature that the court in such cases shall grant the defendant a reasonable amount of time to negotiate with the prosecuting agency in the event the defendant or the defendant's counsel was unaware of the possibility of deportation, exclusion from admission to the United States, or denial of naturalization as a result of conviction. It is further the intent of the Legislature that at the time of the plea no defendant shall be required to disclose his or her legal status to the court."

On February 18, 1999, in the course of changing his plea to no contest on the two pertinent charges, appellant signed and initialed a three-page form which, among other things, recited (as required by section 1016.5): "I FURTHER UNDERSTAND: . . . [¶] If I am not a citizen, a conviction of this offense to which I am now entering a plea may result in my deportation from the country, exclusion from admission to the United States and/or a denial of naturalization pursuant to the laws of the United States."

On the next page of the same form, appellant placed his signature under its final two paragraphs which read: "I declare that my attorney has read and explained this document to me and I hereby freely and voluntarily, having full knowledge and understanding of the rights that I am giving up and the possible consequences which may result from my plea, do hereby request the Court to accept my new and different plea(s). [¶] I declare under penalty of perjury that the foregoing is true and correct."

Directly underneath appellant's signature was a signed and verified statement of his attorney, Assistant Public Defender Otto Pisani, that the latter had "explained the foregoing document to my client" and that appellant "understands the consequences of his/her plea of guilty, that his/her decision to plead guilty was made only after a full discussion with me of the facts and law of this case . . . ."[2]

At the hearing on the change of plea held on February 18, 1999, the trial court undertook the following verbal interchange with appellant:

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[2] To indicate the care with which attorney Pisani took with this document, each time the word "guilty" appeared in it, the initials "NC" were written over that word.

"THE COURT: Mr. Tabrilla, with regard to the waiver form that's been given to me there are a series of rights that are set forth in this waiver form on pages 1, 2 and 3, and next to each of those rights are some initials, which I take it to be AT, your initials?

"THE DEFENDANT: Yes.

"THE COURT: Did you place your initials on this form on these lines next to these rights on pages 1, 2, and 3?

"THE DEFENDANT: Yes.

"THE COURT: And did you do that after each of these rights was explained to you by your attorney?

"THE DEFENDANT: Yes.

"THE COURT: Do you understand each of these rights?

"THE DEFENDANT: Yes.

"THE COURT: Do you understand that by entering a no contest plea you'll be waiving these rights?

"THE DEFENDANT: Yeah.

"THE COURT: Mr. Tabrilla, you have also signed this form on page 3 indicating that each of these rights was explained to you and that you understood them, correct?

"THE DEFENDANT: Yes.

"THE COURT: Is that true?

"THE DEFENDANT: Yes."

The law is clear that the admonitions and warnings required by section 1016.5 may be communicated by a written form, and there is no need for the trial court to deliver them, or repeat them, verbally. (*Arlena M. v. Superior Court* (2004) 121 Cal.App.4th 566, 570; *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 174-175 (*Gutierrez*); *People v. Ramirez* (1999) 71 Cal.App.4th 519, 521-523 (*Ramirez*); *People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1620 (*Castaneda*); *People v. Quesada* (1991) 230 Cal.App.3d 525, 534-537.)

There is, of course, a requirement—both regarding the admonitions contained in section 1016.5 and others both constitutionally and legislatively mandated—for the trial

court to confirm that the defendant has read and understood what he or she has signed. (See, e.g., *Ramirez, supra,* 71 Cal.App.4th at p. 522.) But, as our Supreme Court has held: "[A] defendant who has signed a waiver form upon competent advice of his attorney has little need to hear a ritual recitation of his rights by a trial judge. The judge need only determine whether defendant had read and understood the contents of the form, and had discussed them with his attorney." (*In re Ibarra* (1983) 34 Cal.3d 277, 286 (*Ibarra*).)

It is regarding this requirement that appellant contends the 1999 inquiries of the trial court were deficient. Appellant's position is that, when the trial court inquired of him if he understood the implications of the form he had signed and initialed, it asked him only if he understood the waiver of his "rights" implicated in the plea process, and not if he understood the "immigration consequences" of his plea. We find this argument meritless for two reasons. First of all, it may fairly be characterized as "exalting form over substance." (*Castaneda, supra,* 37 Cal.App.4th at p. 1620.) Second, it disregards directly pertinent precedent.

When, in February 1999, the trial court was being asked to accept appellant's change of plea to one of no contest to two of the four counts with which he was charged, it had before it, as noted earlier, a three-page Solano County court form entitled "WAIVER OF CONSTITUTIONAL RIGHTS AND DECLARATION IN SUPPORT OF DEFENDANT'S MOTION TO CHANGE PLEA." The form covered waivers of rights ranging from the proverbial soup to nuts. It first listed, in six numbered paragraphs, substantive rights appellant was waiving, i.e., to a speedy and public jury trial, to confront witnesses, etc. Each of these paragraphs had opposite it a place for appellant to affix his initials—which he did in each case. There then followed an eight-paragraph section of the form headed, as noted above, by "I FURTHER UNDERSTAND" and including, as subparagraph d., substantially the language mandated by section 1016.5. At the conclusion of this eight-paragraph section was yet another space for appellant to initial—which he did.

But that was not all: the third and final page of the form contained four more numbered paragraphs which appellant also was required to—and again did—initial. These covered such matters as *Harvey* waivers, promises that had and had not been made to him, and concluding with the two final paragraphs quoted above, just above appellant's signature.

As an obvious consequence of this, when the court fulfilled its *Ibarra* duty to confirm that appellant had read, consulted with his attorney concerning, and thus understood what he was initialing and signing, it had to cover a wide variety of waivers, advisements and the like, only one of which related to immigration status. In light of these circumstances, we simply cannot agree with appellant that a trial court must separately inquire concerning a defendant's specific appreciation of the "immigration consequences" of the plea being tendered. If such were the case, it would necessarily follow that specifically-worded inquiries would have to be made concerning all else that was being acknowledged, waived, etc., by such standard court forms.

Indeed, *Ramirez,* which appellant cites and relies upon, clearly rebuts the argument he makes in his briefs to us. In its penultimate paragraph, that decision reads: "Here the record contains a copy of the change of plea form which appellant signed. Thus we are able to review the adequacy of the language used. Appellant was warned of all three possible consequences in precise statutory language. In addition, the record establishes the trial court inquired into whether appellant had reviewed the form with his attorney, whether it had been translated into Spanish and *whether appellant understood the advisements discussed and the rights ultimately waived.* The statute requires no more." (*Ramirez, supra,* 71 Cal.App.4th at p. 523, emphasis added.) *Ramirez* thus establishes that it is perfectly appropriate for a trial court confirming a defendant's understanding of a plea form which includes a section 1016.5 admonition to use generalized terms such as "advisements" and "rights" and, conversely, need not use such specific terms as "immigration consequences" in the course of this process.

This conclusion is also consistent with our Supreme Court's holding in *Zamudio* that "substantial compliance" with the mandates of section 1016.5 is all that is required.

In that case, the court reversed a summary denial of a prosecution petition for writ relief from a San Joaquin County Superior Court order granting a defendant's motion to withdraw an earlier plea of no contest to a vehicle-related felony charge. The superior court's basis for granting that motion was that the admonition given the defendant omitted that portion required by section 1016.5 relating to his possibly being denied later admission to the United States. The court ruled, among several other things, that the trial court had erred in failing to consider the issue of whether the defendant had been prejudiced by the incomplete advisement, because the process mandated by section 1016.5 was a "matter of procedure" only. (*Zamudio, supra,* 23 Cal.4th at pp. 194-198.)

In the course of so holding, the court also considered the People's argument that the San Joaquin court had "substantially complied" with section 1016.5 in the course of giving its original admonition to the defendant. Although it did not expressly rule on this issue (because of the failure of the record to reveal whether the defendant might have been eligible for readmission to the U.S.), the court impliedly held that the doctrine of substantial compliance applied in this context. It stated: "Nevertheless, if defendant's circumstances at the time of his 1992 plea did not, in fact, allow for the possibility of his subsequent exclusion from the United States in the event he were deported, the advisements he received concerning deportation and naturalization would have been in substantial compliance with the requirements of section 1016.5, in that they would have informed defendant of the only consequences pertinent to his situation." (*Zamudio, supra,* 23 Cal.4th at p. 208.) As our colleagues in a panel of the Second District have recently noted, in so stating the court "implicitly recognized that substantial, not literal, compliance with section 1016.5 is sufficient." (*People v. Gutierrez, supra,* 106 Cal.App.4th at pp. 173-174.)

In the 2004 hearing on appellant's motion to withdraw his 1999 no contest plea, the trial court carefully considered the circumstances, many of them noted above, concerning the 1999 form signed and initialed by appellant and his attorney, and the dialogue, also quoted above, between the court and appellant. Among other things, it specifically noted (1) "the laundry list of possible consequences" of the plea being

proffered, (2) the 1999 form's concluding declarations by both appellant and his counsel, (3) the obvious care (as per the "NC" interlineations) taken by appellant's then-counsel regarding the form, and (4) several post-1999 writings signed by appellant—including his 2004 declaration in support of the motion to withdraw the plea—that strongly tended to confirm his ability to understand written English.

Under these circumstances, the trial court clearly did not abuse its discretion in denying appellant's motion to withdraw his plea.

IV. DISPOSITION

The judgment is affirmed.

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Haerle, J.

We concur:

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Kline, P.J.

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Ruvolo, J.